STATE OF MICHIGAN

COURT OF APPEALS

SUSAN K MOLL,

Plaintiff-Appellant,

v

CONLEE OIL CO and JOHN DOES,

Defendant-Appellees.

UNPUBLISHED
August 10, 2004

No. 250057
Saginaw Circuit Court
LC No. 02-45778-NO

Before: Judges Whitbeck, CJ, and Owens and Schuette, JJ

PER CURIAM.

Plaintiff appeals as of right an order granting summary disposition pursuant to MCR 2.116(C)(10) to defendants. This case arose when plaintiff stepped back to avoid an opening door, fell, and broke her ankle. We affirm.

According to plaintiff, on September 27, 1999, she stopped at defendant's convenience store. It was in the middle of the day, the weather was clear, and she had no difficulty seeing. She parked her car, stepped up onto the sidewalk, and approached the side door. Nothing blocked her vision of the step or sidewalk. She thought the door opened inward. As she was reaching for the side door, a man started to open the door from inside the store. Instead of opening inward, the door opened outward from left to right when facing the door. When she stepped back to let him pass by and to avoid being hit by the door, she stepped off the sidewalk and fell. She acknowledged that she did not look back to see where she was stepping. She did not remember how she landed on her ankle, but she heard it crack twice. According to plaintiff, there was not enough room to step back from the door without stepping off the sidewalk. However, she could not explain why she did not step to the side rather than backward. The broken ankle required surgery, and she wore a cast for twelve weeks.

Plaintiff sued defendants for negligence alleging that they failed to use reasonable care to protect her as an invitee from a dangerous condition. According to plaintiff, the dangerous condition was the combination of the outward-swinging door and a sidewalk that was not wide enough to step backward on without stepping off the sidewalk. Defendants moved for summary disposition pursuant to MCR 2.116(C)(10) claiming the condition was open and obvious. Plaintiff argued that the fact the door opened outward was not open and obvious, and an accident was foreseeable when the outward-swinging door was combined with the narrow sidewalk. The court noted that open and obvious conditions were not actionable, but where special aspects

made an open and obvious condition unreasonably dangerous, the owner had to take reasonable precautions to protect the invitee. The court found that no special aspects existed.

Plaintiff first argues that summary disposition was improper because the condition was not open and obvious. We disagree.

A trial court's decision on a motion for summary disposition pursuant to MCR 2.116(C)(10) is reviewed de novo to determine whether an issue of material fact existed or whether the moving party was entitled to judgment as a matter of law. *Meyer v City of Center Line*, 242 Mich App 560, 574; 619 NW2d 182 (2000). All reasonable inferences must be resolved in favor of the nonmoving party. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 618; 537 NW2d 185 (1995). If there is no reasonable chance of uncovering further factual support for the nonmoving party's position through further discovery, summary disposition is appropriate. *Village of Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000). Generally, a duty to take reasonable steps to safeguard premises is owed by the premises possessor to the invitee. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). However, no duty exists if the dangerous condition is open and obvious. *Id.*

In the instant case, the primary condition that caused plaintiff's injury was a step. Michigan courts have held on numerous occasions that a step is an open and obvious condition. *Lugo, supra* at 517; *Bertrand, supra* at 614-615.

> [B]ecause steps are the type of everyday occurrence that people encounter, under most circumstances, a reasonably prudent person will look where he is going, will observe the steps, and will take appropriate care for his own safety. Under ordinary circumstances, the overriding public policy of encouraging people to take reasonable care for their own safety precludes imposing a duty on the possessor of land to make ordinary steps 'foolproof.' Therefore, the risk of harm is not unreasonable. [*Lugo, supra* at 522, quoting *Bertrand, supra* at 616-617.]

Here, plaintiff stated that she stepped backward, stepped off the step, and broke her ankle; she admitted that there was nothing blocking her view of the step, there was sufficient light to see the step, and she simply did not look behind her when she stepped backward. Because plaintiff did not look where she was stepping, she arguably did not take reasonable care for her own safety and should be precluded from imposing a duty on defendants. *Lugo, supra* at 522, quoting *Bertrand, supra* at 616-617. Although plaintiff may have been subjectively unaware of the step's location, whether a condition is open and obvious is determined by an objective standard. *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 11; 574 NW2d 691 (1997). In other words, an open and obvious condition is determined by whether an average person of ordinary intelligence would have seen the condition and recognized the potential danger. *Hughes, supra* at 10, citing *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993).

Still, the amount of care exercised by a plaintiff is irrelevant to whether the condition was unreasonably dangerous, and a court must focus on the objective nature of the condition rather than the subjective degree of care. *Lugo, supra* at 523-524. Whether a condition is open and obvious depends on whether a reasonable person would foresee the danger. *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1, 5; 649 NW2d 392 (2002), citing *Hughes,*

supra at 11. Because a commercial door could open either inward or outward, it would be reasonable to anticipate that the door might open outward. Moreover, because the door opened outward, a handle would likely be located on the outside to pull the door open; this would put people on notice with respect to the direction the door opened.

Furthermore, "[r]egarding open and obvious dangers, 'an invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite knowledge of it on behalf of the invitee.'" *Joyce v Rubin*, 249 Mich App 231, 238; 642 NW2d 360 (2002), quoting *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992). Our Supreme Court has determined from physical surroundings similar to the instant case – an elevated sidewalk running along a building which was the width of a door that opened outward – that the danger of falling was open and obvious. *Bertrand, supra* at 622-623. Therefore, because the physical conditions in the current case is similar to *Bertrand*, the court properly concluded that the conditions were open and obvious. *Id.*

Plaintiff next argues that the combination of the narrow sidewalk, the step, and the outward-opening door contained special aspects that prevented defendants from avoiding a duty to undertake reasonable precautions to protect her, and cites the similarities in *Bertrand, supra* at 621-622, to support her position. We disagree.

Although there generally is no duty to protect an invitee from an open and obvious condition, "if special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk." *Lugo, supra* at 517. Except for the location of the vending machines and the cashier's window, the physical conditions in *Bertrand, supra* at 621-622, were indeed similar to plaintiff's description of the physical conditions here. In *Bertrand, supra* at 623-624, the Supreme Court stated that the combination of the step, the hinging of the door, and the location of the cashier's window and vending machines created a genuine issue of material fact whether the physical conditions were unreasonably dangerous despite their open and obvious nature. *Id.*

However, in the instant case, no vending machines or cashier's window contributed to the danger. In *Bertrand, supra*, it arguably was the location of the vending machines and cashier's window that made the situation dangerous; because the vending machines were located to the left of the door, a person was forced to step off the sidewalk to allow the door to shut to reach the cashier's window. *Bertrand, supra* at 622-623. Thus, the physical conditions in the instant case were insufficient to create an issue of material fact whether they were unreasonably dangerous that would justify submitting the question to the jury. This conclusion is supported by the more recent developments in this area of law.

In *Lugo*, a 2001 case, the Supreme Court explained that examples of special aspects included dangers that were unavoidable and dangers that imposed an unreasonably high risk of severe harm. *Lugo, supra* at 518. However, "only those special aspects that [gave] rise to a uniquely high likelihood of harm or severity of harm if the risk [was] not avoided [would] serve to remove that condition from the open and obvious danger doctrine." *Id.* at 519. The condition had to be so unreasonably dangerous that it created a risk of severe injury or death. *Corey, supra* at 6, citing *Joyce, supra* at 243. The possibility of falling several feet did not create a substantial risk of severe injury or death. *Corey, supra* at 7. Thus, the possibility of falling six inches did

not create a substantial risk in the instant case. *Id.* The court did not err when it granted defendants summary disposition.

Affirmed.

/s/ William C. Whitbeck
/s/ Donald S. Owens
/s/ Bill Schuette